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NTSB Order No. EA-4076

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. HARVEY BONHAM FOX, Respondent.	Docket SE-11422

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued on May 30, 1991, following an evidentiary hearing.[1] The law judge affirmed an order (complaint) of the Administrator finding that respondent

[1]The initial decision, an excerpt from the hearing transcript, is attached.

had violated 14 C.F.R. 91.65(d) and 91.9.[2] The law judge affirmed these charges but dismissed the complaint to the extent it alleged that respondent had violated 14 C.F.R. 91.75(b).[3] (Respondent's use of his certificates was not affected by the

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[2]§ 91.9 (now 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.65(d) (now 91.123(e)) read:

> Unless otherwise authorized by ATC [air traffic control], no person operating an aircraft may operate that aircraft according to any clearance or instruction that has been issued to the pilot of another aircraft for radar air traffic control purposes.

[3]§ 91.75(b) (now 91.123(b)) provided:

> (b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

Administrator's order or the law judge's decision, as any sanction was waived pursuant to the Aviation Safety Reporting Program.) We deny the appeal.

Respondent was the non-flying, pilot-in-command of Trans World Airlines' November 21, 1989 evening Flight 559 between St. Louis, MO and Austin, TX. The parties do not dispute the relevant facts.

Respondent assumed the radio and radar duties, having some concern for lightning in the area.[4] At 0212:51, ATC assigned him a new radio frequency (132.65) to use to contact Kansas City ARTC Center. He wrote that frequency down and acknowledged it.[5] Later, when respondent dialed in the 132.65 frequency, he omitted the "5," dialing 132.6 only.

According to respondent, on tuning in the incorrect frequency, he identified his aircraft (ostensibly at 0213:15, per Exhibit A-3). He was awaiting an acknowledgement from ATC when he ostensibly heard a clearance directing an aircraft to climb and maintain 29,000 feet. (His earlier clearance had been to 23,000 feet. Exhibit A-2 at 0205:13.)[6]

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[4]There apparently was only one set of headphones, and the communications were not broadcast in the cockpit.

[5]This aircraft had only a "single head" radio and, thus, could not dial in the next frequency and later switch the radio to it, as dual head radios permit.

[6]Three transcripts are in the record. Exhibit A-2 is a complete, certified transcript prepared by the FAA. Exhibit A-4 is an excerpt of A-2. Exhibit A-3 contains respondent's version of conversations on the tape (Exhibit A-1), with interpretations and commentary.

Respondent interpreted the clearance ("Northwest 229 climb and maintain flight level two nine zero.") as one for his flight, TWA 559.[7] He responded: "Up to two nine zero TWA five five nine." Exhibit A-3 at 8, time 0213:27. At this point, he turned the radio over to the first officer.

The traffic controller manning the 132.6 frequency heard 559's clearance acknowledgement but was in the midst of talking with Northwest Flight 226 and did not catch respondent's call sign. The controller knew something was wrong (see Tr. at 10). Immediately following his assurance that the Northwest flight had received and understood its clearance (as it had not yet responded due to the erroneous call sign used), the controller attempted to contact respondent.

The 132.6 controller broadcast "O K other aircraft calling [unintelligible] Kansas City." He rebroadcast this message twice more, at 0214:14 and at 0214:38 ("[O]ther aircraft calling Kansas City say again"). TWA 559 did not respond. Respondent testified that, even if he had been on the radio and had heard that conversation (which he was not, having turned the radio over to the first officer), it would not have prompted any action on his part as he was convinced the earlier clearance was directed to TWA 559. Tr. at 79.

Some minutes later (beginning at 0216:32, some 4 minutes after 559 had been assigned the 132.65 frequency) the controller

[7]The controller mistakenly called the Northwest flight number 229 when issuing the clearance, and later mistakenly called it 225. It actually was Flight 226.

for the 132.65 frequency began his attempts to contact respondent's aircraft. He broadcast the aircraft's flight number twice seeking an acknowledgment, and on the land line apparently asked his fellow controllers for assistance. (It is not clear to whom he is speaking, but at 0219:10 he said "see if you still have a TWA five fifty nine there for me." At 0219:34, the controller on the 132.6 position called his supervisor. The controller of the 132.65 position, at 0221:38, also said on the land line: "this is twenty nine see if maybe a TWA five fifty nine came over with some of those other guys that wasn't suppose to [be] there I'm just trying to find him.")[8] Flight 559, receiving on 132.6, would not have heard any calls to it that were broadcast on 132.65.

At 0221:44, respondent (still on 132.6) radioed his position, "out of two eight zero for two nine zero." He testified at the hearing that this communication signified his intent to obtain a clearance to a higher altitude. Tr. at 77 ("it's kind of a gentle nudge. I'm trying to say I want higher."). ATC queried his position, determined it was acceptable, and told him he was on the wrong frequency and had assumed a clearance directed to another aircraft.

The law judge dismissed the § 91.75(b) allegation, finding that ATC contributed to the deviation when the controller manning the 132.6 frequency failed to catch respondent's call mistakenly

[8]The controllers manning the 132.6 and the 132.65 frequencies are across the room from each other. Tr. at 8.

assuming Northwest 226's clearance. Initial decision at 4 ("It took concerted errors to equal the deviation that did finally occur. . . ."). She, however, affirmed the claimed § 91.65(d) and 91.9 violations, stating:

> It was sheer out and out negligence on the part of Cpt. Fox not to set that frequency dial correctly and, in the long run, it did lead to all of these other things.

Initial decision at 5.

On appeal, respondent argues that these findings are internally inconsistent in that, if ATC was equally culpable in connection with the clearance deviation supporting the § 91.75 charge thus exonerating respondent, then he must be exonerated for the same reason on the "taking the clearance of another" charge. While respondent's argument may have some merit, we need not answer the question as we find ample support in the record and precedent for affirmance of the § 91.65(d) and 91.9 charges.[9]

We have held that we will not affirm the Administrator's order when ATC is the initiating or principal cause of the violation of the regulations. See, e.g., Administrator v. Snead, 2 NTSB 262 (1973); Administrator v. Nelson and Keegan, 2 NTSB 1900 (1975); and Administrator v. Clary, 3 NTSB 2380 (1980). These principles were most recently discussed in Administrator v. Frohmuth and Dworak, NTSB Order EA-3816 (1993), where we

[9]We disagree with the law judge's conclusion that § 91.75 was not violated. Although the Administrator did not appeal the law judge's dismissal of the § 91.75 charge, and we therefore do not formally address the issue, we remain able to affirm the § 91.65 charge using a theory that would require (or permit) affirmation of the § 91.75 charge as well.

clarified that, even if a deviation from a clearance is caused by a mistake on the pilot's part, that mistake will be excused and no violation will be found if, after the mistake, the pilot takes actions that, but for ATC, would have exposed the error and allowed for it to be corrected.

In her decision, the law judge was applying only one limited aspect of our precedent in her finding that ATC contributed to the deviation.[10] We cannot find here either that ATC was the initiating or principal cause of the incident or that respondent took all reasonable steps after his mistake and that it was ATC's fault that the mistake was not quickly exposed and resolved.

Respondent's first error was in his mis-entering of the frequency. After doing so, he did not take those reasonable actions that would have uncovered the mistake. Although the Administrator's transcript contains no reference to a squelch, listening to the tower tape itself confirms respondent's contention that he identified his aircraft to ATC at approximately 2:15:15. See Exhibits A-3 and A-2. Respondent, however, did not await an acknowledgment by that controller of his signing on to the new frequency. He should have done so prior to his accepting any clearance. In that way, there would have been no doubt that two-way radio communications had been established. If the controller manning the 132.6 frequency had spoken directly to respondent's aircraft, the subsequent misappropriation of a clearance would have been far less likely

[10]She found: "it took two to tango." Initial decision at 4.

to occur because the controller, immediately knowing to whom he was speaking, could immediately have corrected respondent's error.

Moreover, respondent's second mistake -- accepting a clearance not directed to him -- was not initiated by ATC, nor was ATC its principal cause. The controller for frequency 132.6 did not expect respondent on his channel, yet he reacted promptly when he realized there was a problem. And, the controller for frequency 132.65 did not wait such an inordinately long time before he tried to raise respondent that we would excuse respondent's conduct, were such delay a factor in our analysis. The unrebutted evidence indicates that TWA 559 would have heard the conversation between Northwest 226 and ATC, confirming 226's clearance to 29,000 feet. TWA 559 did not call to clarify to whom the clearance was directed, nor did the aircraft respond to ATC's repeated request for aircraft that had called Kansas City to respond.[11]

Respondent also challenges the § 91.65(d) finding on the grounds that, allegedly, it applies only to willful acts. Respondent, however, offers no support for this proposition in the language of the subsection, in case law, or in a review of the rule's development. As the Administrator points out in reply, case law does not require proof of a willful act. See

[11]While it is not dispositive, we also note that respondent's allegedly routine query (at 0221:44) intended to suggest a higher clearance, is phrased in language much in the nature of what would be said in an initial sign on to a new frequency announcing his position and call sign.

Nelson and Keegan, 2 NTSB 1900 (1975).[12]

Respondent also suggests that a finding against respondent here is inconsistent with the FAA's own interpretation and application of § 91.65(d). While this could be an important issue if true, the fact that the Administrator exercises prosecutorial discretion is not, we think, equated to a finding of inconsistent interpretation, especially when the facts of the cases are not the same. Thus, whether the law judge was correct in excluding material regarding the Administrator's determination not to prosecute another pilot, is at most harmless error.[13]

Finally, respondent argues that the § 91.9 finding was incorrect as a matter of law and fact. Respondent argues that the dialing in of the wrong frequency cannot be careless, in law or fact. Not only does this claim ignore respondent's later inaction, as detailed above, and the law judge's finding (initial decision at 3) that respondent was not unusually busy,[14] it ignores precedent, as set forth, for example, in Administrator v. Haney, NTSB Order EA-3832 (1993) and Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there (a

[12]Respondent further suggests, but does not elaborate, that the rule applies only to formation flight. As with the above claim, in the absence of convincing support for this proposition, we must reject it.

[13]The Administrator asks that this rejected material, which respondent includes in his brief, be stricken from the record. We can see no real harm in respondent's presenting the documents rather than describing them. We deny the motion.

[14]Respondent also testified that things in the cockpit were normal. Tr. at 85.

violation of an operational regulation is sufficient to support a finding of a "residual" or "derivative" § 91.9 violation). Respondent's additional argument that his action cannot be careless because there was no danger in the incident also conflicts with precedent. Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1157 (10th Cir. 1986), cert. den'd, 486 U.S. 1006 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to strike is denied; and

2. Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT and HALL, Members of the Board, concurred in the above opinion and order.